IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.212 OF 2005

Vimal Nath, An Indian Inhabitant carrying on business in the name of M/s.Sharika Intl having his his office at D-834, New friends Colony, New Delhi. ..Petitioner.

V/s.

1. Union of India through its officer 240C, Income Tax Office, Churchgage, Mumbai.

2. Commissioner of Customs, New Customs House, Ballard Estate Mumbai.

3. Customs, Excise & Service Tax Appellate Tribunal, R.K.Puram New Delhi. ..Respondents.

Mr.V.S.Nankani, Advocate i/b. ACE Legal Consultants for Petitioner.

Mr.V.H.Kantharia, Advocate i/b. Dr.T.C.Kaushik for respondents.

CORAM : V.C.DAGA AND J.P.DEVADHAR, JJ.

DATED : 14TH OCTOBER, 2005.

JUDGMENT (PER J.P.DEVADHAR, J.)

1. A short but interesting question of law raised

in this petition is, whether, the Commissioner of Customs, Bombay has jurisdiction / authority to demand customs duty from the petitioner in respect of goods which are not at all imported by the petitioner at the Bombay port ?

2. The facts relevant for this petition are that on 16/2/1994 an advance licence was issued by the licensing authorities at Delhi permitting the petitioner to import duty free raw materials amounting to Rs.22,82,803/- with corresponding export obligation as more particularly set out in the licence. The said licence was valid for 12 months. The port of registration mentioned in the licence for the purpose of imports was the port at Bombay. The said licence was duly registered at the Customs House at Bombay.

3. It is the case of the petitioner that before utilisation of the said licence, the petitioner applied to the Licensing authorities at Delhi for change of Port of registration from Bombay to New Delhi and the same was allowed by the licensing authorities at New Delhi. Thereafter, the petitioner imported raw materials under the said advance licence at New Delhi by air. The said raw materials were allowed duty free

clearance as per Notification No.203/92-Cus dated 19/5/1992 under the above value based advance licence. On fulfilment of the export obligation the petitioner applied for discharge of bond / legal undertaking along with the requisite certificate from the Range Superintendent, Central Excise, NOIDA regarding non availment of input stage credit under Rule 50A or 57A of Central Excise Rules, 1944. The licensing authorities at New Delhi, after due verification of the documents have issued discharge certificate on 14/2/1997 in favour of the petitioner.

4. Subsequently, the Commissioner of Customs, Bombay by a show cause notice dated 26/10/1998 called upon the petitioner to show cause as to why duty amounting to Rs.42,88,416/- with interest at the rate of 24% p.a. should not be demanded and recovered from the petitioner under section 28 of the Customs Act, 1962 in respect of the goods imported under the advance licence dated 16/2/1994 and cleared by availing the benefit of Notification No.203/92 Cus. dated 19/5/92 as more particularly set out in the annexure to the show cause notice. The annexure to the said show cause notice dated 26/10/98 was however, totally blank regarding the date of the bill of entry, description of

goods, quantity of goods and even the declared value of the goods alleged to have been imported by the petitioner. It was stated that the demand for Rs.42,88,416/- has been raised by treating the estimated bond amount as duty. Thus, the demand raised in the show cause notice was only an estimated demand and was not based on the goods actually imported by the petitioner.

5. The petitioner replied to the said show cause notice vide letters dated 25/11/1998 and 19/11/1999. It was stated in the said letters that the port of registration mentioned in the licence was amended by the licensing authorities at Delhi and that the petitioner has effected imports and exports under the said advance licence by air from New Delhi. It was also stated that on fulfilment of the export obligation, the licensing authorities at New Delhi by their letter dated 14/2/1997 have discharged the bond / legal undertaking given by the petitioner. Accordingly, the petitioner requested that the show cause notice dated 26/10/1998 be dropped.

6. Rejecting the contention of the petitioner, the Commissioner of Customs, Mumbai by his order-in-

original (OIO) dated 30th October, 2000, confirmed the demand of duty for Rs.42,88,416/- with interest at the rate of 24% from the date of clearance of the goods till payment and also levied penalty of Rs.4,00,000/-.

7. On receipt of the said order, Shri.Ashok Arora a representative of the petitioner personally met the Commissioner of Customs at Mumbai some time in January, 2001 and explained the facts. It is the case of the petitioner, that the learned Commissioner agreed to close the file on submission of the relevant papers. Accordingly, the petitioner submitted all the requisite documents to show that the imports / exports under the advance licence has been effected from Delhi and that on fulfilment of the export obligation, the licensing authorities at New Delhi have discharged the bond / legal undertaking given by the petitioner under the aforesaid advance licence. The petitioner was under the impression that in the light of the documents furnished, the demand raised by OIO dated 30/10/2000 would not be enforced.

8. However, by a letter dated 25/7/2003 the customs authorities at Bombay once again called upon the petitioner to pay Rs.42,88,416/- with penalty of

Rs.4,00,000/- as per the OIO dated 30/10/2000 within a period of 3 weeks, failing which recovery shall be initiated in terms of provisions of section 142 of the Customs Act, 1962.

9. By a letter dated 13/8/2003, the petitioner once again placed all the facts on record and requested for withdrawal of the notice as the liability under the advance licence has already been discharged by the licensing authorities at New Delhi.

10. However, the Assistant Commissioner of Customs, Confirmed Demand Cell, Mumbai issued a Detention order on 25/9/2003 for recovery of the demand confirmed by the order dated 30/10/2000 and ordered for detaining and selling any goods belonging to the petitioner anywhere in India. Thereupon, the petitioner filed an appeal before CESTAT, New Delhi with an application for condonation of delay to challenge the order in original dated 30/10/2000. The Tribunal by its order dated 12/5/2004 declined to condone the delay and consequently dismissed the appeal filed by the petitioner. Hence this petition is filed by the petitioner to challenge the order of the CESTAT, New Delhi dated 12/5/2004 as also the order in original

dated 30/10/2000 and the detention order dated 25/9/2003 issued by the customs authorities at Bombay.

11. Mr.Nankani, learned counsel for the petitioner submitted that although the order of the Tribunal in declining to condone the delay is totally perverse, in view of the objection raised by the revenue regarding the challenge to the said order in this Writ Petition, he would restrict his arguments to challenge the non est / without jurisdiction order of the Commissioner of Customs, Bombay dated 30/10/2000 and the detention order dated 25/9/2003 issued to implement the OIO dated 30/10/2000.

12. Relying upon the decision of the Apex Court in the case of State of **Orissa V/s. Brundaban Sharma & Anr.** reported in **1995 Supp (3) Supreme Court Cases 249**, Mr.Nankani submitted that where an order passed is a non est or illegal order, its validity can be challenged at any stage of the proceedings. In the present case, detention order dated 25/9/2003 is issued to enforce the demand raised by the non est / illegal order passed by the Commissioner of Customs, Mumbai on 30/10/2000 and, therefore, the petitioner is entitled to challenge the same by filing a writ in this Court.

13. In support of his contention that the order passed by the Commissioner of Customs, Bombay is without jurisdiction, Mr.Nankani referred to the following documents, namely;

a) Amendment made to the value based advance licence No.2322949 dated 16/2/1994 by the licensing authorities at New Delhi by substituting the port of registration from Bombay to New Delhi.

b) Copies of Bills of entry evidencing import or raw materials under the aforesaid advance licence dated 16/2/1994 at the cargo terminal, IGI Airport, New Delhi.

c) Copies of 27 shipping bills to show that the export has been effected from the cargo terminal IGI Airport, New Delhi in fulfilment of export obligations under the said advance licence dated 16/2/1994.

d) Extracts from the DEEC book to show that the raw materials under the advance licence

dated 16/2/1994 have been imported under the supervision of the customs authorities at New Delhi.

e) Extracts from the DEEC book to show that in fulfilment of the export obligation under the advance licence dated 16/2/1994, the exports have been effected under the supervision of the customs authorities at New Delhi.

f) Certificates issued by the Central Excise authorities at NOIDA, Delhi to the effect that the petitioner has not taken any benefit under Rule 56A / 57A of the Central Excise Rules, 1944 in respect of the goods imported under advance licence dated 16/2/1994.

g) Copy of the redemption certificate dated 14/2/1997 issued by the licensing authorities, New Delhi to show that on fulfilment of the export obligations under advance licence dated 16/2/1994, the bond / legal undertaking given thereunder has been

redeemed.

In the light of the aforesaid documents which were placed before the Commissioner of Customs, Bombay, Mr.Nankani submitted, that the Commissioner of Customs at Bombay had no jurisdiction to demand duty from the petitioner in respect of the goods imported at New Delhi. Moreover, when the authorities at New Delhi under whose supervision the petitioner had effected the imports / exports under the advance licence dated 16/2/1994 are satisfied that the petitioner has fulfilled the export obligations and have discharged the bond / legal undertaking, the Commissioner of Customs at Bombay had no jurisdiction to demand customs duty from the petitioner. Mr.Nankani further submitted that merely because the said licence dated 16/2/1994 was originally registered at Bombay, it was not open to the Commissioner of Customs at Bombay to demand customs duty when in fact no imports were made at Bombay. Accordingly, Mr.Nankani submitted that order in original passed by the Commissioner of Customs dated 30/10/2000 being without jurisdiction, the detention order passed on 25/9/2003 to enforce the demand confirmed in the order in original dated 30/10/2000 is also liable to be quashed and set aside.

14. Mr.Kantharia, learned counsel appearing on behalf of the respondents on the other hand, submitted that against the order of CESTAT, New Delhi, the petitioner had a remedy of filing a statutory appeal before the Delhi High Court and, therefore, this Court should not entertain the petition under Article 226 of the Constitution of India.

15. As regards the merits of the case, the learned counsel for the revenue fairly stated that there is no evidence on record to show that the petitioner had imported the raw materials under the advance licence dated 16/2/1994 at the port at Bombay. He submitted that the documents furnished by the petitioner to show that the imports / exports under the advance licence dated 16/2/1994 have been effected from the cargo terminal IGI Airport, New Delhi and that the obligation under the said licence have been discharged could not be verified, because the customs authorities at New Delhi are not co-operating with the customs authorities at Bombay in verifying the documents furnished by the petitioner.

16. However, referring to para 4.19.2 of Handbook

of Procedures 1992-97, counsel for the revenue vehemently argued that once the advance is registered at Bombay, imports under the said licence could be made only through the port at Bombay and it was not open to the licensing authorities at New Delhi to change the port of registration from Bombay to New Delhi. He submitted that in the absence of any documents to show that no input stage credit has been availed under Rule 56A / 57A of the Central Excise Rules, the benefit of Exemption Notification No.203/92 dated 19/5/1992 was not available to the petitioner and, therefore, the Commissioner of Customs at Bombay was justified in demanding the duty from the petitioner in respect of the goods cleared under the advance licence dated 16.2.1994.

17. We have carefully considered the rival submissions.

18. As regards the preliminary objection relating to the maintainability of the Writ Petition, it is well established in law that when an appeal is dismissed on the ground that the delay in filing the appeal is not condoned, the doctrine of merger does not apply and the validity of the order impugned in the appeal can be

challenged independently, even after the dismissal of the appeal. [See para 28 of the Judgment of the Apex Court in the case of **Chandi Prasad V/s. Jagdish Prasad** reported in **(2004) 8 S.C.C.742]**. In the present case, the appeal filed by the petitioner has been dismissed by the CESTAT, New Delhi on 12.5.2004 by declining to condone the delay in filing the appeal. Therefore, there being no merger of the order in original dated 30/10/2000 in the order of the Tribunal dated 12/5/2004, it is open to the petitioner to challenge the decision of the order in original dated 30/10/2000 independent of the challenge to the order of the Tribunal dated 12/5/2004. Therefore, the writ filed in this Court to challenge the order in original dated 30/10/2000 passed by the Commissioner of Customs, Bombay and the detention order dated 25/9/2003 issued to enforce the order dated 30/10/2000 would be maintainable.

19. Now, turning to the merits of the case, it is an admitted fact that the goods under the advance licence dated 16/2/1994 were not imported at Bombay. Inspite of the fact that the goods under the licence dated 16/2/1994 have not been imported and cleared at Bombay, the Commissioner of Customs, Air Cargo Complex,

Bombay has confirmed the demand for duty solely on the ground that the advance licence dated 16/2/1994 was registered at Bombay. The Commissioner of Customs, Bombay has jurisdiction over the imports and exports effected through the port at Bombay. Therefore, the Commissioner of Customs, Bombay can demand customs duty only if the goods are imported through the port at Bombay. In the present case, as the petitioner has not imported the said goods through the port at Bombay, the Commissioner of Customs, Bombay could not have demanded duty from the petitioner merely because the licence was registered at Bombay. As the petitioner had not imported the goods through the Bombay port, there was no question of furnishing documents relating to the non utilisation of the input stage credit. Therefore, the demand confirmed by the Commissioner of Customs, Bombay against the petitioner on the presumption that because the licence is registered at Bombay, the goods must have been cleared from Bombay, cannot be sustained. Therefore, such a demand which is wholly based on conjecture and surmises has no legal sanctity and the same is liable to be quashed and set aside.

20. The contention of the revenue that the licensing authorities at New Delhi had no jurisdiction

to change the port of registration from Bombay to Delhi is without any merit because, firstly, interpretation of the licensing provisions is left to the licensing authorities and it is not open to the customs authorities to question the same. Secondly, even if the advance licence dated 16/2/1994 was registered at Bombay, in the absence of any import of goods through the Bombay port, the Commissioner of Customs, Bombay could not have confirmed the demand against the petitioner. Even the show cause notice issued to the petitioner did not contain any particulars regarding the alleged duty free clearance of goods under the advance licence dated 16/2/1994 through the port at Bombay and, therefore, the demand raised against the petitioner cannot be sustained.

21. Moreover, in the present case the petitioner had furnished documentary evidence to establish that the port of registration mentioned in the licence has been changed from Bombay to Delhi by the licensing authorities at New Delhi. The petitioner has also furnished documentary evidence to show that as per the amended licence, the petitioner had effected imports and exports through the customs port situated at the IGI Airport, New Delhi and that on fulfilment of the

export obligation, the licensing authorities at New Delhi have redeemed the bond / legal undertaking given by the petitioner. The petitioner has also produced the certificates from the excise authorities to show that the input stage credit under Rule 56A / 57A has not been availed by the petitioner. The Commissioner of Customs, Bombay does not doubt the veracity of any of the documents furnished by the petitioner. The grievance of the Commissioner of Customs, Mumbai is that the excise / customs authorities situated at Delhi are not co-operating in the matter in verifying the documents submitted by the petitioner. If the Commissioner of Customs is unable to verify the documents, it cannot be presumed that the documents furnished by the petitioner are not genuine. Therefore, in the absence of any imports effected through the port at Bombay and in the absence of reason to doubt the veracity of the documents furnished by the petitioner, the Commissioner of Customs, Bombay was not justified in demanding customs duty from the petitioner. Therefore, the demand raised against the petitioner as well as the action taken to enforce the demand are illegal and contrary to law.

22. For all the aforesaid reasons, the order in

original dated 30/10/2000 as well as the Detention order date 25/9/2003 issued for enforcement of the demand raised under the Order-in- Original dated 30/10/2000 are quashed and set aside and the rule is made absolute in the above terms with costs.

(V.C. DAGA,J.)

(J.P. DEVADHAR, J.)